FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 171

MARY LOUISE REINOLD,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

MARTIN A. SCHENCK,
FREDERICK R. GRAVES,
Attorneys for Petitioner.

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TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully represents to this Court:

I.

Summary Statement of the Matter Involved.

The suit, brought under the Act of March 9, 1920 known as the Suits in Admiralty Act, on a Crew Life and Injury policy of insurance issued by the War Shipping Administration covering the master, officers and crew of the Merchant Vessel Baltic, after a trial before Hulbert, D.J., resulted in a decree in admiralty awarding $5,000 to libellant, the beneficiary. The Circuit Court of Appeals of the Sec-

ond Circiut, on the appeal of the Government, reversed and dismissed the libel.

The vessel, of Panamanian registry, was operated under a time charter to the War Shipping Board. The United States had put machine guns in placements aboard with an armed guard in control of such armament, under the Joint Resolution of Congress approved 17 November, 1941 respecting the arming of merchant vessels (55 Stat. 764). (Text set forth at beginning of annexed brief.)

The policy (Libellant's Ex. 1, Record p. 40a) was issued by the War Shipping Administration under and in accordance with the Act of Congress of the 29th, June, 1940 (54 Stat. 690) (Text set forth at beginning of annexed brief) and covered, among others, accident and loss of life to Backus, Chief Officer, directly occasioned by seizure, "restraints and detainments and other warlike operations" and acts of "peoples in prosecution of hostilities • • • whether before or after declaration of war and whether by a belligerent or otherwise".

While the vessel was in the Harbor of Montevideo late at night on the 29th of June, 1942, Rosborough, one of the Armed Guards, became drunk and started to fire into the air bursts from a machine gun which had been fixed in its placement on the starboard side of the bridge of the vessel. Backus, the Chief Officer and the highest then in command among the crew, under the Wartime Instructions for United States Merchant Vessels (Respondent's Ex. A, Record p. 51a), was charged with the responsibility for the safety of all on board. At the time the shooting in the air started he was on another deck. But in accordance with the duty placed upon him he went upon to the bridge in an attempt to get Rosborough away from the machine gun. Two men had preceded him and in the struggle and before Backus arrived at the machine gun, he was shot and killed. (Record, pp. 11a, 29a, 30a)

Judge Hulbert held that there was a restraint exercised by the United States Navy in the arming and equipping of the merchant vessel in a warlike operation against

enemy submarines, that Backus was shot and killed while in the performance of his duty and that the proximate cause of his death was that restraint. (Record, p. 57a, *et seq.*) Reported in 72 F. Supp. 92.

The Circuit Court of Appeals on the appeal of the Government reversed with directions to dismiss the libel (Opinion printed at end of Record, Reported in 167 Fed. (2) 556) on the grounds:

(a) That the "partial independence" of the Armed Guard was not sufficient to constitute a "restraint" as that word was used in the policy;

(b) That the Armed Guard was furnished to protect the vessel from attacks by the enemy;

(c) That minor limitations on the master's authority did not constitute that "paramount control of the operations of the vessel signified by the term 'restraint' ";

(d) That there was only "a most limited interference with the conventional control of the master of the vessel";

(e) That the death not attributable to "warlike operations" but "was immediately due to a drunken brawl and not to anything normally occurring as the result of the presence on the vessel of an armed guard or within the reasonable contemplation of the parties to the policy".

II.

The Basis Upon Which It Is Contended That This Court Has Jurisdiction.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347(a)).

III.

The Questions Presented.

(1) Did not the placing in stations of guns aboard the vessel by the United States and putting an armed guard in charge thereof, and the promulgations by the United States of rules placing responsibility for safety of all on board on Backus constitute, separately or together, a restraint within the meaning of the policy.

(2) Was there not error in the various doctrines originated by the Circuit Court of Appeals to the contrary namely: that there was no "restraint", because of the partial independence of the armed guard; because the armed guard was furnished to protect the vessel; because the limitations on the master's authority did not constitute "paramount control of the operations of the vessel"; because there was a "most limited interference with the conventional control of the master of the vessel?"

(3) Was not the loss occasioned by "warlike operations" and by the acts of "peoples in the prosecution of hostilities * * * after declaration of war" within the policy provisions?

(4) Was not the proximate cause of the death of Backus the restraint exercised by the United States Navy while the vessel was engaged in warlike operations?

(5) Was there not error in the contrary holding of the Circuit Court of Appeals that the proximate cause of the death was not a warlike operation but was a drunken brawl?

(6) Was there not error in construing this government life insurance policy on the crew as though it were a marine commercial contract policy on cargo or vessel and in thus limiting "restraint" to cases in which "a government assumes general control over the movements of a vessel"?

IV.

Reasons Relied Upon for the Allowance of the Writ.

(1) The questions are important in that they involve the construction of a form of war risk indemnity policy of the United States, issued under the authorization of an Act of Congress and brought into operation by a Joint Resolution of Congress in respect of arming merchant vessels.

A construction should be placed upon the government insurance policy under the emergencies reflected in these two acts which would subserve the national purpose in justifying men of the crew to incur the additional risks involved in serving in wartime on merchant vessels armed by the United States.

This Court has not heretofore passed upon, or, construed this standard obligation of the United States.

(2) The decision of the Circuit Court of Appeals that there can be a partial restraint which, although by the sovereign, is not sufficient to constitute the restraint and coverage is novel. It practically destroys the insurance. It is an important question of federal law which has not been but should be settled by this Court.

(3) The decision of the Circuit Court of Appeals that the merchant vessel, though armed by the United States and with an armed guard of the United States and sailing in wartime, was not in a warlike operation presents an important question of federal law which has not been but should be settled by this Court.

(4) The decision of the Circuit Court of Appeals that the vessel was not in a warlike operation should be reviewed by this Court because on a matter of maritime insurance law it is in conflict with the decision of the House of Lords in *Attorney General* v. *Adelaide Steamship Co.*, 1923 A. C. 292.

(5) The decision of the Circuit Court of Appeals that the proximate cause of the death of Backus was not a restraint exercised by the United States Navy but a drunken brawl is a federal, question decided in a way probably in conflict with the applicable decision of this Court. (*Standard Oil Co.* v. *United States,* 267 U. S. 76, 77).

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued, directed to the Circuit Court of Appeals of the Second Circuit in respect of its reversal of the decree of the District Court, to be reviewed by this Court and for such other relief as to this Court may seem proper.

Dated: July 21, 1948.

MARTIN A. SCHENCK
FREDERICK R. GRAVES
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL

We hereby certify that we have examined the foregoing petition for a writ of certiorari and that in our opinion it is well founded and the cause is one in which the petition should be granted.

Dated: New York, N. Y.
July 21, 1948.

MARTIN A. SCHENCK
FREDERICK R. GRAVES
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

October Term 1948

No. .....

MARY LOUISE REINOLD,
Petitioner,
against
UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This Petition seeks review on certiorari to Circuit Court of Appeals, Second Circuit, of its reversal (with dismissal of libel) of the decree of the District Court, Southern District of New York, awarding libellant $5,000 for death of Backus, Chief Officer of the armed merchant vessel Baltic, under a Crew Life and Injury policy issued by the War Shipping Administration.

The Act of Congress which authorized the formulation of a policy shaped to a particular emergency in American water-borne commerce was of 29th June, 1940 (54 Stat. 690) and in the sections involved herein, is as follows:

"AN ACT

To amend the Merchant Marine Act, 1936, as amended to provide for marine war-risk insurance and reinsurance and for marine risk reinsurance, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title II of the Merchant Marine Act, 1936, as amended, is amended by adding at the end thereof a substitle to read as follows:

'SUBTITLE—INSURANCE

'Sec. 221. (a) For the purpose of protecting the water-borne commerce of the United States from the impediments and burdens arising from the lack of adequate facilities for the insurance of such commerce, due to extraordinary risks arising under existing war conditions, the Commission is authorized to provide marine insurance and reinsurance against loss or damage by the risks of the war and reinsurance against loss or damage by marine risks, as prescribed in this substitle, whenever it appears to the Commission that such insurance adequate for the needs of the water-borne commerce of the United States cannot be obtained on reasonable terms and conditions from companies authorized to do an insurance business in a State of the United States.

• • • • •

'Sec. 223. (a) The Commission may reinsure any company authorized to do an insurance business in any State of the United States on account of marine and marine war risks, including protection and indemnity risks, assumed by any such company, on (1) property or interests as set forth in section 222 (a) and (b) of this subtitle, and (2) masters, officers, and crews of American vessels (including any such vessel owned or controlled by or chartered to the Commission) against loss of life, personal injury, or detention by any government except that of the United States following capture.

• • • • •

'Sec. 224. Whenever the Commission determines that insurance for masters, officers, and crews of American vessels against loss of life, personal injury, or detention by any government except that of the United States following capture, arising from risks of war, cannot, with the aid of reinsurance provided for under this subtitle, be obtained on reason-

able terms and conditions from companies authorized to do an insurance business in a State of the United States, the Commission is authorized to provide such insurance on a basis corresponding to the war risk insurance protection supplied, prior to such determination, for such personnel by companies authorized to do business in a State of the United States.

"SEC. 225. In the event of disagreement as to a claim for losses or the amount thereof, on account of insurance under this subtitle, an action on the claim may be brought and maintained against the United States in the district court of the United States sitting in admiralty in the district in which the claimant or his agent may reside, or in case the claimant has no residence in the United States, in a district court in which the Attorney General of the United States shall agree to accept service.

* * * * *

Approved, June 29, 1940."

It will be noticed that the United States is excluded from being a cause of loss only in respect of "detention by any government except that of the United States following capture."

The Joint Resolution of Congress which authorized (we contend) the restraints in regard to which the policy was formulated and forced the vessel into warlike operations, was in respect of arming merchant vessels and was made 17 November, 1941 (55 Stat. 764) and is as follows:

"JOINT RESOLUTION

To repeal sections 2, 3, and 6 of the Neutrality Act of 1939, and for other purposes.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of the Neutrality Act of 1939 (relating to commerce with States engaged in armed conflict), and section 3 of such Act (relating to combat areas), are hereby repealed.

> SEC. 2. Section 6 of the Neutrality Act of 1939 (relating to the arming of American vessels) is hereby repealed; and, during the unlimited national emergency proclaimed by the President on May 27, 1941, the President is authorized, through such agency as he may designate, to arm, or to permit or cause to be armed, any American vessel as defined in such Act. The provisions of section 16 of the Criminal Code (relating to bonds from armed vessels on clearing) shall not apply to any such vessel.
>
> Approved, November 17, 1941, 4:30 p. m., E. S. T."

The policy involved (Lib. Ex. 1, R. p. 40a, *et seq.*) is by the War Shipping Administration and insures the master officers and crew of the vessel against "loss of life and bodily injury". Schedules 1 and 2 (R. p. 41a) set forth $5,000 for loss of life and a percentage scale of indemnities for various injuries and states:

> "The indemnities referred to above are payable, provided loss results directly and exclusively from bodily injuries, within 90 days from the date of accident."

The policy is signed by the Administrator of the War Shipping Administration, but is not valid until countersigned by or on behalf of the Director of Wartime Insurance.

Under Clause B (not involved herein) the United States is specifically excluded. For that reason and because of the language itself (we contend) the United States is included under Clause A, immediately involved herein.

Under Clause A, there is insurance during the employment of the crew on or by the vessel (R. p. 44a):

> "*Against* loss of life and bodily injury to the master, officers, and crew (including within the term 'crew' licensed and unlicensed seamen, including radio operators and cadets) directly occasioned by capture, seizure, destruction by men of war, piracy, takings at sea, arrests, restraints and detainments

and other warlike operations (including collisions in convoy but with reservation of subrogation rights under owner's marine policies or against other colliding vessel, in the event it is determined that such collision is attributable to marine causes) and acts of kings, princes, and peoples in prosecution of hostilities or in the application of sanctions under international agreements, whether before or after declaration of war and whether by a belligerent or otherwise, including factions engaged in civil war, revolution, rebellion or insurrection, and including the risks of aerial bombardment, floating or stationary mines, and stray or derelict torpedoes."

Under Clause B (R. p. 45a), the United States is specifically excluded:

"B. In the event of either—

(1) the internment of any or all of the personnel of the vessel, or

(2) the destruction or abandonment of the vessel resulting from capture, seizure, arrest, restraint, detainment, condemnation, preemption, requisition, or confiscation, or the consequences thereof, or of any attempt thereat as a consequence of hostilities or warlike operations, either before or after the declaration of war by any country, government, or political body other than the United States of America or any State or political division thereof or any government which is or may become party signatory of the 'United Nations Pact' promulgated on or about January 2, 1942, the insurance herein provided for shall be extended."

POINT I.

Whether there was a "restraint" within the policy is an important question of Federal Law which has not been but should be decided by this Court.

There could be no more appropriate word to insure a member of the crew against the changed and added hazards of serving on an armed merchant vessel brought about by sovereign power in repealing the neutrality laws and in forcing the merchant vessel in the firing line than the word "restraint." The committee that were authorized to shape the insurance in a recited emergency selected an appropriate word and placed it in an appropriate context.

The following quotations, with our italics, are taken from "Restraint of princes and rulers" as defined in Baldwin's Century Edition of Bouvier's Law Dictionary (1926):

> "The words apply only *to the ruling power of a country* and not to pirates or any lawless power; 4 Term 783; they apply not only to hostile acts, but *to those committed by the government of which the assured is a subject,* as the seizure of a vessel for use as a fire-ship; 2 Ld. Raym. 840; or to the wrongful seizure of an English ship and cargo by a British ship of war; 2 E. & E. 160; L. R. 5 Q. B. 599; to a temporary embargo by a friendly government; 6 Term 413; 3 B. & S. 163; 32 L. J. Q. B. 50; a detention of a neutral vessel in a blockaded port; 7 L. R. Q. B. 404; or a siege; L. R. 9 C. P. 518. A reasonable apprehension of capture will justify delay under the usual exception of restraint of princes, etc.; L. R. 5 P. C. 301; L. R. 3 A. & E. 435; 1 Maule & S. 352.
>
> • • • • •
>
> "Enforced obedience to lawfully prescribed quarantine regualtions is a restraint of natural liberty of action devised by and proceeding from the people, and detention at quarantine is fairly in-

cluded within an exception in a charter party which has reference to restraint of princes or rulers and people; 3 U. S. Aup. 147."

POINT II.

Whether the loss was occasioned by warlike operations, within the meaning of the policy is an important question of Federal Law which has not been but should be decided by this Court. The decision below on a subject of Maritime Insurance is in conflict with the decisions of the House of Lords.

The Government was formulating a new method of fighting the peculiar danger of the German submarine. The German submarine was directed not against the crews of merchant vessels but against cargoes. Crews were sometimes allowed to take to boats before the vessel was sunk. Arming merchant vessels was essentially a protection to cargoes. It changed and possibly added to the risks to which the crews were subjected.

Merchant vessels scattered along the coast and armed with machine guns, manned by armed Navy guards, constituted an effective wartime, protective and aggressive method of warfare.

Though the vessel was in a neutral harbor the navy rules provided that her guns be readied and that ammunition be handy.

How the term "warlike operation" in the Government's policy should be construed depends somewhat on the construction which should be put upon the government purposes as shown in the two Acts of Congress, *supra*.

England in the First World war used similar methods in fighting the German submarine. It requisitioned vessels, in some cases armed them and put navy men abroad, and insured the vessels (we have found no case where the crew were given insurance similar to that here, seemingly,

intended) against the changed risks and in the insurance used terms similar to those used in the present policy.

In *Attorney General* v. *Adelaide Steamship Co.* 1923 A. C. 292, the Warilda was requisitioned by the Admiralty whereby the Admiralty was not responsible for marine risks but was responsible for war risks including "all consequences of hostilities and warlike operations". The Warilda, employed as an ambulance transport, with 603 wounded men abroad, proceeding from Havre to Southampton under Admiralty instruction at top speed and without lights, ran into a vessel carrying coke. Both were injured.

The Warilda, as a result of the German authorities in disregarding the sanctity of hospital ships, was taken off the list of hospital ships and was known as an ambulance transport. It was armed for defense against enemy submarines in accordance with a written order of the Ministry of Shipping. The Red Cross flag ceased to fly. Three Royal Navy men were taken on board. Lord Shaw of Dunfermline said at p. 299:

> "It appears accordingly to be beyond question that the ambulance transport Warilda thus converted and armed was part of the naval forces of the country."

It was held that the vessel was on a warlike operation and that the injury was occasioned by the warlike operation. Lord Shaw of Dunfermline, at p. 300, concluded:

> "Once the category of warlike operations attaches to the movements of the vessel, that category must continue to attach although those movements had an element of negligence in their operations."

Lord Wrenbury said at p. 308:

> "The loss was occasioned by a warlike operation negligently performed. The Admiralty had insured against warlike operations, however they might happen, including therefore, negligence."

In *Attorney General* v. *Ard Coasters Ltd.* and in *Liverpool & London War Risks Insurance Assn. Ltd.* v. *Marine Underwriters,* 1921 A. C. (2), 141, the House of Lords determined two cases which have an important bearing herein. In the one case a steamship was requisitioned by the Admiralty on the terms that the Admiralty should take the risk of "all consequences of hostilities or warlike operations." The steamship was lost by collision with the British destroyer Tartar which was patrolling for submarines. Lord Sumner, at p. 153 said:

> "The Tartar was on patrol, and so all her manoeuvres in the course of that duty were her warlike operations."

In the other case a merchant vessel insured against war risks including "all consequences of hostilities or warlike operations" was sailing in convoy from the United States to England and at the same time a British warship was proceeding on a voyage to pick up another convoy. The warship ran into the merchant ship and damaged her. The details were unknown but the damage was held to be the result of warlike operations in that the war vessel was steaming on a particular course which she took as a part of a warlike operation. The collision was held to be directly caused "by that part of her warlike operation." Lord Parmoor, at p. 154, stated that almost any movement in wartime at sea of one of his Majesty's ships was a warlike operation.

The Court below has frustrated a great public purpose in this Government's action against submarines in the Second World War when it limited "warlike operations" to hostile acts and accepted the argument of the government (appellant's brief below p. 6 et seq.) that "restraint" had a meaning fixed by private underwriters in drawing lines between war and marine risks at the time of the Napoleonic Wars and that it was a form of capture. The Circuit Court of Appeals referring to Arneuld on Marine Insurance (written before the present problem arose in regard to the

crew of a vessel) was of the opinion that the restraint must be a government's "general control over the *movements* of a vessel." The problem of the sovereign in arming its own merchant vessels was new and the old words should be construed in application to the new situation. The construction should not overlook the reappraisal of these terms made by the House of Lords (cases supra) in regard to its government's similar actions against submarines in the First World War. The Court below has excluded loss "occasioned" by acts of the United States from coverage and has restricted the policy to acts of hostile governments although the policy specifically includes within "restraints and detainments and other warlike operations", "collisions in convoy" which could not be other than by acts of the United States or its allies. And the words of the policy covering loss of life occasioned by acts of "peoples in prosecution of hostilities or in the application of sanctions under international agreements, whether before or after declaration of war and whether by a belligerent or otherwise" necessarily include the acts of the United States whether before or after entry into the Second World War.

No cases cited by the Court below lends support to its decision.

In *Crist* v. *United States War Shipping Administration*, 163 F. (2), 145 cited below, the Circuit Court of Appeals of the Third Circuit in reversing, analyzed the facts taken on deposition, and held that the libellant's contention that the loss occurred (a) from a "restraint" because the vessel was compelled by naval authority to sail in a convoy, or (b) from a restraint in that the rescuing vessel abandoned the "Maiden Creek" because of the danger of submarines, was not *on the facts* established. (The vessel was not in convoy at the time of the loss). The Court stated that there was no evidence that a navy crew was aboard the "Maiden Creek". It further held that the rescuing vessel "Exhibitor" left the "Maiden Creek" primarily because of the conviction that the distressed vessel did not intend to abandon but was intent on continuing its voyage.

One of the novel doctrines originated by the Court below is that there cannot be a *partial* restraint, or rather, to put it the other way, that the "partial independence" of the armed guard did not constitute a restraint, that the limited interference of the master's authority, though by the United States, did not constitute sufficient paramount control of the operations of the vessel.

Although this Court has not written on the subject, we think that the nearest decision of this Court is against it.

In *Standard Oil Co.* v. *United States,* 267 U. S. 76, the restraint was protective by a power which was not hostile to the United States. This Court said (at p. 77):

> "But whether the intervention was more or less, if by mutual understanding, after a manifestation of armed force, the last word was with the lieutenant, it does not matter whether he uttered his commands often or rarely. The lieutenant while denying that he had a general charge of the navigation testifies again and again to facts that show that he assumed and was recognized to be the ultimate power."

POINT III.

That the proximate cause of the death of Backus was not the restraint exercised by the United States Navy but was a drunken brawl is a Federal question decided by the Circuit Court of Appeals in a way probably in conflict with the applicable decisions of this Court.

Under the doctrine of the Circuit Court of Appeals there was at any rate some interference with the vessel and the activities of the crew by reason of the installation of the guns and their management by the armed guards.

In respect of such interference the United States Navy had promulgated rules. (Ex. A. p. 51a *et seq.*) When the ship is anchored where she is exposed to attack the gun is

to be kept cleared for action with a ready supply of ammunition maintained at the gun (p. 51a).

The Government at p. 5 of its brief below stated:

> "Backus was in command of the vessel while the master was ashore. *He was charged with responsibility for the safety of all on board and in so far as necessary to discharge this responsibility had authority over the armed guard.* (Respondent's Ex. "A", Sec. 9, Subsection 1902, Subdivision "F", Appendix 53A). He was not prevented from restraining Rosborough before harm ensued by any Governmental order or regulation, but on the contrary *was under the duty to confine Rosborough as soon as he noticed his drunken and quarrelsome condition.* This he failed to do although he had been attacked." (Italics ours).

These admissions made by the Government, in a case involving no issue of fact, show that the Government must have foreseen the necessity for rules which placed upon the dead man the duty, in the protection of all on board, of confining the drunken armed guard as soon as he started to shoot the machine gun into the air. Rosborough was alone on the bridge at the time he shot the bursts into the air. The obligation which Backus met his death in performing was an obligation thus admittedly placed upon him by the Wartime Instructions for United States Merchant Vessels by the United States Navy. It followed and flowed from changed conditions forced upon the crew by Governmental authority. The category of warlike operations had attached and had continued. (House of Lords cases, *supra*).

The decision of the Circuit Court of Appeals is probably in conflict with the decision of this Court in *Standard Oil Co.* v. *United States,* 267 U. S. 76, at p. 77:

> "But if a vessel should be taken from an owner's hands without his consent and should be lost while thus held by a paramount power, obviously a company that had insured against such a taking could not look beyond and attribute the loss to a peril of

the sea. *Whatever happens while the taking insured against continues fairly may be attributed to the taking. That is a nonconductor between the insured and subsequent events.*" (Italics ours).

CONCLUSION.

The Petition for the Writ Should Be Granted.

Respectfully submitted,

MARTIN A. SCHENCK,
FREDERICK R. GRAVES,
Attorneys for Petitioner.

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 171

MARY LOUISE REINOLD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the Southern District of New York (R. 57a–62a) is reported at 72 F. Supp. 92. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 68–73) is reported at 167 F. (2d) 556.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 29, 1948 (R. 74). The petition for a writ of certiorari was filed on July 22,

1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether the court below erred in declining to hold that the death of Backus, the chief officer of the MV *Baltic,* caused solely by the drunken act of an off-duty member of the armed guard crew on board the ship in Montevideo Harbor, was caused by a "restraint" or "warlike operation" within the meaning of the war risk policy applicable to members of the ship's crew.

CONTRACT PROVISION INVOLVED

The coverage portion of the war risk insurance policy here involved is as follows (R. 44a):

> *Against* loss of life and bodily injury to the master, officers, and crew (including within the term "crew" licensed and unlicensed seamen, including radio operators and cadets) directly occasioned by capture, seizure, destruction by men of war, piracy, takings at sea, arrests, restraints and detainments and other warlike operations (including collisions in convoy but with reservation of subrogation rights under owner's marine policies or against other colliding vessel, in the event it is determined that such collision is attributable to marine causes) and acts of kings, princes, and peoples in prosecution of hostilities or in the application of sanctions under international agreements, whether before or after

declaration of war and whether by a belligerent or otherwise, including factions engaged in civil war, revolution, rebellion or insurrection, and including the risks of aerial bombardment, floating or stationary mines and stray or derelict torpedoes.

STATEMENT

This suit was instituted by the filing of a libel against the United States on June 26, 1944, to recover the proceeds ($5,000) of a policy of war risk insurance, issued by the War Shipping Administration as agent for the United States,[1] on the life of Ernest F. Backus as an officer of the MV Baltic, a vessel owned and operated by the Panama Transport Company (R. 1a, 37a, 39a, 40a). Petitioner is the beneficiary named by Backus. The sole question presented is whether the death of Backus was caused by a "restraint" or "warlike

[1] The insurance was issued pursuant to the provisions of the Act of June 29, 1936, c. 858, 49 Stat. 1985, as amended by the Act of June 29, 1940, c. 447, 54 Stat. 689, the Act of March 6, 1942, c. 154, 56 Stat. 140, and the Act of April 11, 1942, c. 240, 56 Stat. 214. The insurance provisions of the Merchant Marine Act, 1936, were later further amended by the Act of March 24, 1943, c. 26, 57 Stat. 47, and the Act of April 24, 1944, c. 178, 58 Stat. 216. 46 U. S. C. 1128–1128h. By Executive Order No. 9054, February 7, 1942, 7 F. R. 837, the duties and authority of the Maritime Commission with respect to marine and war risk insurance under the Merchant Marine Act were lodged in the Administrator of the War Shipping Administration, and this transfer of function was confirmed by the Act of April 11, 1942, c. 240, 56 Stat. 217, 46 U. S. C. 1128g.

operation" within the coverage of the policy. The pertinent facts are as follows:

On June 29, 1942, the MV *Baltic* was in Montevideo Harbor (R. 15a). The vessel had sailed from Baltimore, Maryland and, putting into Miami, Florida, for repairs, had been there joined by a United States Navy armed guard crew (R. 5a–6a).[2] The ship was in Montevideo to deliver a cargo of crude oil picked up in Ecuador and consigned to a branch of the Uruguayan Government (R. 39a). The cargo was moved under a time charter arrangement with the War Shipping Administration and was in the course of being discharged at the time of the death of Backus (R. 9a, 39a).

The death of Backus took place on the night of June 29, 1942, while the *Baltic* lay in Montevideo Harbor (R. 15a–16a). The master of the ship and the officer in charge of the armed guard were both ashore (R. 13a, 15a, 17a). Backus, as chief officer of the ship, was in authority (R. 16a). One Rosborough, a member of the armed guard crew, went below, after being relieved of duty,[3] and be-

[2] The guns manned by this crew had been on the MV *Baltic* from the outset of this voyage and had been manned by merchant seamen gunners prior to the time the vesse' put into Miami (R. 6a).

[3] A member of the armed guard crew was kept on guard duty aboard the vessel in port for the security of the Navy equipment (R. 21a). On the night here involved, Rosborough had been on duty during the early evening and had been relieved by another member of the armed guard crew, Platt (R. 21a, 35a, 36a).

came extremely drunk and belligerent (R. 8a, 9a, 10a, 11a, 13a, 18a, 25a, 28a, 31a, 32a). At that time and during the ensuing events, Rosborough made threats against Backus, Captain Ray, the master of the vessel, and Lieutenant Ferguson, the officer in charge of the armed guard crew (R. 8a, 9a, 10a, 12a, 16a, 27a, 33a). In the course of being forcibly put to bed several times, Rosborough fought with Backus and with Pendarvis, a member of the armed guard crew (R. 25a, 28a, 32a, 33a). Rosborough did not stay in bed but arose and went about seeking, but not obtaining, a knife (R. 26a). Subsequently, at approximately a quarter after midnight, he suddenly appeared at the starboard machine gun and began to fire the gun (R. 11a, 26a). Backus, Williams (merchant crew), and Phillips (armed guard crew) approached Rosborough from various directions to overpower him and get him away from the gun (R. 11a, 26a–27a, 33a). In the course of this effort, Rosborough fired another burst from the gun which killed Backus (R. 26a–27a, 29a–30a).

The case was tried on deposition and on the record of the court martial proceeding against Rosborough (R. 4a, 13a–14a). The district judge found "* * * that the proximate cause of * * * death was the restraint exercised by the U. S. Navy while said vessel [*Baltic*] was engaged in warlike operations" (R. 61a). The district judge stated that Backus, as chief officer, "had no authority or control over the gun crew or the

guns and ammunition" and that this was "a restraint exercised by the U. S. Navy" (R. 59a–60a). The district court further held that the presence of the armed guard crew on board the vessel for protective purposes was "unquestionably a warlike operation" (R. 60a). Judgment was accordingly awarded in favor of petitioner (R. 64a).

The court below reversed the district court decree and remanded the case with directions to dismiss the libel. The court below noted that the death of Backus had not been caused by a "restraint" or "warlike operation" but was "immediately due to a drunken brawl and not to anything normally occurring as the result of the presence on the vessel of an Armed Guard or within the reasonable contemplation of the parties to the policy." (R. 70–71, 73.) The court held that no covered war risk was the proximate cause of the death of Backus (R. 73).

ARGUMENT

Petitioner contends that war risk policy coverage exists herein on two grounds, advanced "separately or together" (Pet. 4). First, petitioner urges that the *Baltic* was under "restraint" or engaged in "warlike operations," apparently for all purposes, solely by virtue of the fact that a protective armed guard crew had been placed on board the vessel (Pet. 4, 12–17). Running through this contention are suggestions by petitioner that

some general Congressional purpose lay behind the issuance of war risk policies whereby blanket coverage, without regard to the nature of the peril involved, was afforded to officers and members of the crews of merchant ships (Pet. 4, 13, 15–16). Petitioner's second contention is that the death of Backus was caused by a "restraint" within the meaning of the policy as the result of the instructions for merchant vessels issued by the United States in connection with placing armed guard crews on board such vessels (Pet. 4, 17–19). In this connection, petitioner argues that the authority and responsibility of the master and officers of the *Baltic* over internal management of the ship and the safety of all persons on board stemmed solely from such instructions insofar as members of the armed guard crew were concerned (Pet. 2, 4, 18).

We submit that there is no merit to petitioner's contentions. Controlling doctrine herein was not "originated" by the court below (Pet. 4) but, on the contrary, is contained in a well considered and traditional body of case law applicable to the precise policy in terms as that here involved. Such doctrine was properly applied by the court below in disposing of the narrow issue presented by the unique facts of this case.

1. The statutory authority to write war risk insurance is specifically conditioned on an administrative finding that such insurance "can-

not * * * be obtained on reasonable terms and conditions from companies authorized to do insurance business in a State of the United States." Section 224 of the Act of June 29, 1936, 49 Stat. 1985, as added by the Act of June 29, 1940, 54 Stat. 689. Upon such finding, the War Shipping Administration[4] was authorized "* * * to provide such insurance on a basis corresponding to the war risk insurance protection supplied, prior to such determination, for such personnel by companies authorized to do business in a State of the United States. * * *"[5] Section 224, *supra*.

There is thus nothing in the statutory foundation for the war risk policy here involved to support petitioner's suggestion that the policy issued should be construed in a manner sharply different from the construction given to nongovernmental war risk policies. On the contrary, it seems clear that the writing of governmental war risk insurance on a basis other than that used commercially was not authorized by Congress.

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[4] The authority to write insurance was transferred from the Maritime Commission to the War Shipping Administration on February 7, 1942. Fn. 1, *supra*, p. 3.

[5] For the purpose of this case, the statutory authority limited the writing of Government insurance to insurance covering "risks of war". Section 224, *supra*. The authority to write insurance was amended to authorize the inclusion of marine risks in war risk insurance policies in respect to masters, officers and crews by Section 2 (a) of the Act of March 24, 1943, c. 26, 57 Stat. 45, 47, an amendment which in general eliminated the need for determining the question of war risk *vel non* as to policy coverage thereafter.

Pursuant to the authorization given, the War Shipping Administration issued policies which employed the classic and familiar formulae for delimiting war-risk coverage.* See contract provisions here involved, *supra*, pp. 2–3. The legal effect of the language thus employed, insofar as the question here presented is concerned, is well established. A "restraint" within the meaning of the policy requires a showing that the peril which necessarily occasioned the loss involved some act properly done in the exercise of governmental or sovereign powers. *Crist* v. *United States War Shipping Administration*, 163 F. (2d) 145 (C. C. A. 3), certiorari denied 332 U. S. 852, and cases discussed therein; *Leyland Shipping Co., Ltd.* v. *Norwich Union, Ltd.* (1917), 1 K. B. 873 (Court of Appeal); Arnould, *Marine Insurance* (12th Ed., 1939), Section 905. The same careful construction has been given to other phases of war-risk coverage. "Warlike operations" is not construed to cover all acts done generally in the course of a war; rather, the inquiry is whether the specific peril which occasioned the loss was a "warlike operation." *Queen Insurance Company* v. *Globe & Rutgers Fire Insurance Company*, 263 U. S. 487; and see opinion in that case of the Second Circuit Court of Appeals in 282 Fed. 976, at pp. 978–979; and opinion of Judge Hough in 278 Fed. 770, at p. 782. In other words, the question on a claim of

* War-risk coverage is, of course, not cumulative. Its area is separate from, and in addition to, marine coverage.

war-risk coverage is not the existence of some general condition of preparedness or protection but whether a specific war risk, as distinguished from other peril, occasioned the loss involved; the dispositive issue is a determination of proximate cause. *Crist* v. *United States War Shipping Administration, supra; Queen Insurance Company* v. *Globe & Rutgers Fire Insurance Company, supra; Britain Steamship Co.* v. *King* (The *Matiana*), [1921] A. C. 99, 109–110, 118–119, 129, 135–136; *Harrisons, Ltd.* v. *Shipping Controller,* [1921] 1 K. B. 122, 135; *S. S. Larchgrove* v. *King*, 1 Ll. L. Rep. 498, 36 T. L. R. 108 (K. B. 1919).

Applying these principles, it is obvious that no "restraint," "warlike operation," or other war peril occasioned the death of Backus. His death was solely and immediately caused by Rosborough's drunken conduct, fully described in the statement of facts, *supra,* pp. 4–5. And it seems too clear to require argument that Rosborough's conduct was entirely independent of the governmental purpose in placing the armed guard crew on board the Baltic for the protection of the vessel and cannot be considered as a circumstance which constituted a peril within the coverage of the policy.

Nor can a different result be reached by petitioner by emphasizing the instructions issued to the Baltic (and to all merchant ships given the protection of an armed guard crew) in connection with the jurisdiction of the armed guard and its

officer. As recognized by the court below, a court well versed in traditional admiralty matters, these instructions did not create authority and responsibility in the Baltic's officers as to matters of internal safety (R. 70–71). On the contrary, a fair reading of the instructions shows that their obvious intendment was to preserve the preexisting and traditional authority of the Baltic's ranking officer in this regard and to carve from that authority certain areas in matters of protection and military decision. The instructions specifically stated: "In accordance with law, the master commands the vessel and is charged with her safe navigation and the safety of all persons on board." (R. 53a, 71.) Moreover, members of the armed guard crew were specifically "subjected to the orders of the master of the merchant vessel as to matters pertaining to internal organization" (R. 52a, 70). In the main, the balance of the instructions carefully map out the area, in connection with actual protection and defense, of armed guard crew automony (R. 51a–56a).[7] We submit that petitioner's argument that these instructions created a duty in Backus, as chief officer, to control and

[7] Cases such as *Standard Oil Co.* v. *United States*, 267 U. S. 76, relied on by petitioner (Pet. 18), are accordingly not in point. Such cases involve situations where a ship is taken from the owner's control. In the *Standard Oil* case, the vessel was actually boarded by a British naval party which was in full control of the ship at the time the loss occurred. The instant case, under a proper reading of the instructions, presents exactly the opposite situation.

disarm Rosborough is invalid. It is clear, as shown above, that the instructions preserved rather than created such authority and duty.[8]

2. No matter of general importance is here presented which warrants further review. The determination of war risk coverage in cases of this type turns on an inquiry of fact, and the circumstances of the instant case are unique. Only a few cases, dependent upon widely varying facts, which involve crew war risk life and injury insurance policies, are in litigation, and it is unlikely that many more will arise since the applicable two-year statute of limitations in which to make claim under such policies has long since expired.[9]

CONCLUSION

The decision of the court below is clearly correct. There is no conflict of decision and further

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[8] In any event, petitioner's argument in this respect seems to be based on the false assumption that the actions of Backus, as chief officer, sprang only from his relationship under the instructions to members of the armed guard crew. It seems obvious that Backus was under a duty to members of his own crew, apart from the instructions, which would have dictated the same course of action which he actually pursued.

[9] Suits against the United States to recover on war risk policies are required by the Merchant Marine Act (46 U. S. C. 1128d) to be brought under the Suits in Admiralty Act, which contains a two-year statute of limitations (46 U. S. C. 745). The first form of seamen's war risk policy, on which the petitioner sues, required that "claim" be made by the payee "within two years after the date of accident"; the Second Seamen's War Risk Policy, adopted March 19, 1943, requires, in general, that suit be brought within two years from the time the insurance becomes payable.

review is not warranted. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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